

June 30, 1767.

ANSWERS

FOR

Mr. BENJAMIN MOLINEUX Merchant in
WOOLVERHAMPTON ;

TO THE

PETITION of ARCHIBALD JOHNSTON Merchant
in KELSO.

BEFORE entering upon the particulars of the Petition now to be answered, the Respondent hopes he will be forgiven for making one general observation, which must frequently have occurred to your Lordships. It is this, That there seldom or never arises any dispute in this Court, between the merchants of this country and their correspondents or factors, either foreign or inland, unless the goods commissioned are prevented from coming to their hands, either *damno fatali*, or by being seized as counterband. This observation, though too well founded, does little honour to our merchants ; and yet the Respondent is persuaded, that he will, in the course of these answers, be able to satisfy the Court, That the Petitioner has no earthly apology for refusing to do the Respondent justice, but that the goods commissioned probably never came to his hands, though this happened by an unavoidable act of Providence, and without the most distant blame on part of the Respondent.

The Petitioner commissioned a parcel of goods from the Respondent, (who lives 130 miles from London), which he packed up, addressed for the Petitioner, and delivered to a carrier, in order to be conveyed to a wharfinger at London,

don, to be by him shipped on board the first vessel for Leith. If the Respondent is able to satisfy your Lordships, that he so far executed this commission, as to deliver the goods to the proper carrier, he humbly apprehends, that no more is incumbent on him, though in the present case he is able to go much further, and to shew evidently, that he has done much more than was incumbent on him as a factor or merchant, employed to send goods from one part of this country to another.

That the goods were delivered to the carrier, is instructed by his receipt in process, of the following tenor: " September 21, (and not the 23d, as it is, by mistake, said to be in the Petition), 1761, Received from Mr. Benjamin Molineux, a box of goods, directed for Archibald Johnston, Kelso; which I promise to deliver in good order, to Mr. Edward Hore, Wharfinger, London, *per* (signed) J^No. FRYER." Of the same date with this receipt, the Respondent sent the Petitioner by post, an invoice of the goods commissioned, together with a letter of advice, acquainting him, that the goods were of that date forwarded to him, to the care of Mr. Edward Hore: Here the Respondent apprehends he had fully executed the commission, and was exaucturated: But, as a further proof that the commission was regularly executed, he has produced the wharfinger's receipt to the carrier, of the following tenor: " Received, London, September 26, 1761, of Mr. Benjamin Molineux of Woolverhampton, *per* his carrier from thence, one box, directed to Mr. Archibald Johnston of Kelso, which was, on said day, shipped on board the Leith Packet, Archibald Pitcairn Master, from this place, and bound for Leith; witness my hand (signed) EDWARD HORE." This last receipt, says the Petitioner, " is evidently *ex post facto*, as appears from the words with which it concludes." From what words in this receipt, this conclusion of an *ex post facto* operation can be inferred, the Respondent must acknowledge he has not penetration enough to discover: Surely, by the same rule, Fryer the carrier's receipt is *ex post facto*, for it never can be presumed, that if the carrier had

granted his receipt to the Respondent of the date it bears, that he would have been so slovenly or inattentive to his own interest, as not to demand the wharfinger's receipt to produce to the Respondent at his return to Woolverhampton.

But, says the Petitioner, it was an express condition in this order, That the goods were to be sent to Dun's wharf, formerly Driver's, at London, to be from thence forwarded by sea to Berwick, along with some goods commissioned by a neighbour in Kelso, Mr. John Crawford: But of this there is not a shadow of proof, except an *ipse dixit*; for, as to the note produced by the Petitioner, and said to be a copy of the order given to Hetherington, the Respondent's clerk, or rider, it indeed is evidently an *ex post facto* operation, which is manifest from this circumstance, that it bears date in August 1761, whereas, the order was given at Kelso upon the 31st July, as is evident from Hetherington's pocket-book produced; from which, it further appears, that Hetherington was at Edinburgh on the 1st of August, which at once accounts for the discrepancy between this scrape of paper and the pocket-book, as well as the invoice of the 21st September; though it merits observation, that instead of exceeding the commission, the goods contained in the invoice fall short of the order in the pocket-book.

But your Lordships will be further informed, that in support of the rider's pocket-book, there is produced, likewise a holograph of him, an exact transcript of the Petitioner's commission as taken in this pocket-book, and which had been transmitted by the rider to the Respondent, in order that it might be executed. Now, was there any reason to doubt, that the scrapes of paper, produced by the Petitioner as an alleged copy of the commission given to the rider, was an *ex post facto* operation? It is, with submission, evident from this circumstance, that the pocket-book and list, both holograph of the rider, correspond in every particular, whereas, the Petitioner's pretended copy of the same, differs widely from both. It is true, the rider's pocket-book and this list differ in some instances, as to the order in which the particulars are

are taken down ; notwithstanding of which, upon an exact comparison (which indeed requires some little attention) they will be found to correspond precisely, not only in every article, but in every one figure and number.

This pocket-book and holograph list both, afford another piece of evidence, which strongly contradicts the story of Dun's wharf ; for, from them it appears, that three Kelso merchants, viz. Mr. Smyth, on the 30th July, and the Petitioner and Mr. Crawford on the 31st July, all gave different commissions to Hetherington. Now, to the first of these, viz. Mr. Smyth's, there is subjoined, "*per* London to Edward Hore." The Petitioner informs your Lordships, that his goods were ordered to come along with those of one of his neighbours, Mr. Crawford ; but, as there is no mention whatever, either of Edward Hore, or any other person, after the Petitioner's or Crawford's commissions, it is evident, either that their goods were ordered to Hore's with those of the other Kelso merchant's, Smyth, or that no particular orders were given as to this matter. But the Petitioner himself acknowledges, that the goods commissioned by his neighbours Smyth and Crawford, of the precise same date with his, and of which the invoice was of the same date, and was by the same post transmitted to them, arrived safe at Leith, and in fact, they were shipped at Hore's wharf ; which is demonstration, that Hore's wharf is the place where the Kelso merchants directed their goods to be shipped, and their doing so, agreeable to the entry in the pocket-book and list, sufficiently disproves the Petitioner's averment, that he was a perfect stranger to Hore's wharf, and never had heard of the name of E. Hore till he received the Respondent's letter of advice, of the 21st September. In truth, there is not a merchant or person in Britain, who deals, or even reads the Edinburgh news-papers, to whom the name of Mr. Edward Hore, and his wharf, are not well known.

Two other material circumstances appear, both from the pocket-book, and list : The first is, that, though several merchants in Tweed-mouth, Berwick, Dunse, and Kelso, gave commissions to this Rider within a few days of the one now

in question, yet not one of the whole direct their goods to be sent to *Dun's wharf, formerly Driver's, London*: On the contrary, the only other wharf there mentioned, besides Hore's, is *Lea's wharf, London*, to which the goods of Mr. Samuel Stanton, and Mr. Walter Rolland, both merchants in Berwick, and those of Mr. James Henderson merchant at Dunse were directed; which demonstrates, that, at all events, the merchants of Berwick, and the neighbouring towns, had not their goods sent by Dun's, but by Lea's wharf; this is further confirmed by a paragraph in this list, prefixed to the commission of Mr. Adam Wilson merchant in Dunse, by which it appears, that M. Wilson, was, on former occasions, in use to receive his goods by Lea's wharf.

The second thing material to be observed is, that as oft as different merchants, all of the same place, gave their commissions to this rider, if the goods of the whole were to be sent by the same conveyance, or to the same wharf, then such conveyance or wharf is only subjoined to one of their commissions; and that to the first in order: Thus, in the present case, first Mr. John Smith, next the Petitioner, and then Mr. John Crawford, all of Kelso, give their separate commissions; Mr. Smith's stands first in order, and to it is subjoined, "To Hore's wharf, London;" but to those of the Petitioner and Mr. Crawford nothing is subjoined, either as to the wharf, or manner of conveyance. Now, the Petitioner acknowledges, first, that he ordered his goods to be sent along with those of his neighbour Mr. Crawford: And next he acknowledges, that Crawford's goods came by a ship to Leith: Further it was averred before the Lord Ordinary, and not now denied, that Crawford's goods came by Hore's wharf. What then are your Lordships to conclude? Why, only this, that the Petitioner directed his goods to be sent by Hore's wharf, along with those of the other two Kelso merchants, Smith and Crawford.

Without any further argument, therefore, on this head, your Lordships are left to judge, whether most credit is due to the Respondent's Invoice, and Letter of Advice, (produced by the Petitioner himself), joined to Hathrington's holograph

graph entries, made both in his pocket-book, and in the list transmitted to him by his master, (all of which correspond exactly, and cannot be suspected to have been calculated with any view to the present process), or to the Petitioner's suspicious scrape of paper; from the end even of which, it will appear to the Court upon inspection, that something has been lopped off, which, probably, was not proper to be published.

Both before the Lord Ordinary, and now in this Petition, a great noise is made, as if the Respondent wilfully suppressed a letter, which, it is alleged, he received from Hetherington, his rider, along with the list of goods produced, containing, among others, the Petitioner's commission: This letter, it is said, if produced, would clear up the whole matter; and would show, that Dun's wharf and the port of Berwick were specified in this commission.

But when the fact, as to this pretended letter, is fully explained, together with the practice of riders when corresponding with their constituents, the argument founded upon it must fall to the ground. In the first place, your Lordships know very well, that no business or transactions whatever, which require writ, are executed in so few words as the affairs of merchants; who, in two lines, frequently, negotiate business of the greatest extent and importance. In the next place, let the business of a Rider be considered: He is dispatched to make the tour of the different trading towns, in order to pick up as many commissions as possible for his constituent; for this purpose, he carries along with him a small pocket-book, such as that here produced, having no other conveyance but his pocket, and a pair of small bags over his saddle, for his patterns, linens, &c. When he gets a commission, he enters the particulars in this book, subjoined to the name of the place, and the name and designation of his employer; when he collects as many commissions as he thinks worth a postage, he copies them from his pocket-book *verbatim*, and these copies he transmits under a blank cover to his constituent, to inform him of his success; where your Lordships will observe, that no relative correspondence

is necessary, since the constituent is informed, by the copies sent, of every thing necessary for the due execution of the commission, viz. the date of it, the merchant's name and place of residence, together with a very minute detail of all the articles commissioned; besides, if any thing particular occurs in relation to any of his employers, this is prefixed to his commission in the list sent to the constituent, and copied from the pocket-book; accordingly, in the list now produced, and in the case of Mr. Adam Wilson of Dunfermline, prefixed to his commission, there is first a fitted account between them, and then the following paragraph: "He has applied to Lea's wharf for a bill of lading for the small parcel that is lost, and they can give no account of it; please to examine the carriers account, and you will find it, and advise him thereof with the carriers receipt; then he will have a right to call on Lea for the value, in case he cannot produce a receipt from the shipmaster. Wilson is a worthy man; I would advise you to oblige him in this case."

This is demonstration, that when the rider had any thing to write in relation to his employers, he prefixed it to their particular commission; by which means, he had no subject left on which to correspond with his constituent; and in fact, when this Rider transmitted the list now produced, it was sent to the Respondent under a blank cover, and no letter of any kind was wrote along with it; and if your Lordships will take the trouble of looking at the list itself, it plainly shows, that it is so distinct and complete in every particular, that a letter, in relation to any of the commissions contained in it, would have been altogether superfluous: But the truth is, the Petitioner is glad to lay hold of this pretended letter of his own creation, in order to raise a clamour against the Respondent, conscious that he has, in every particular, executed the commission agreeable to the constant and uniform practice observed by merchants in the like cases.

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The Respondent must be forgiven, to make another observation on the paragraph just now quoted from the Rider's list, relative to the small parcel belonging to Mr. Wilson of Dunse,

Dunse, which was lost at Lea's wharf: Your Lordships will from thence discover the opinion, not only of Mr. Wilson and the Rider, but indeed of all merchants, in relation to such losses as that which gives rise to the present question, which is plainly this, that no more is incumbent on the factor or merchant but to produce the carrier's receipt in order to instruct the delivery of the goods, after which he is *functus*, and then either the carrier, the wharfinger, or the ship-master must be liable for the goods if they are lost. In the present case, the Respondent has produced the carrier's receipt, the wharfinger's receipt, and a separate acknowledgment that he received the goods, which is ingrossed at full length at the top of the third page of the Petition: Add to this, that though an invoice and a letter of advice was regularly sent in course, acquainting that the goods were sent to Hore's wharf, yet did the Petitioner never find any fault with the Respondent on this account till after the commencement of this process.

Another circumstance must occur to your Lordships, which demonstrates how hard the Petitioner is drove for matter of complaint against the Respondent, when the great and almost only argument urged against him is, that he did not execute the commission regularly, when he sent the goods by a Leith ship, instead of a Berwick salmon smack. Now, when it is attended to that the goods were commissioned upon the 30th of July, and shipped on the 26th of September, it was impossible in the nature of things to find a salmon smack at that time, which was not the season of killing salmon; nor did the close time expire till months after this period.

The Petitioner too finds fault with Mr. Hore, for not sending him the shipmaster's bill of loading. But, first, supposing this to be wrong, it would be hard to impute a blunder in Mr. Hore to the Respondent. In the next place the Respondent is informed, that wharfingers seldom or never send such bills of loading to merchants, because of the expence of postage; and, as to the Petitioner not being able to find his goods among those recovered out of Pitcairn's wreck, he himself admits that he did not enquire after them till long after this catastrophe happened: Besides,

it is not true that all the goods on board of Pitcairn were saved, as alleged in the Petition. And though they had, yet nothing is more common, especially when such fatal accidents happen, than that the directions of goods are either tore off, wore, or otherways defaced.----But all this the Respondent must acknowledge he humbly apprehends to be foreign to the point in issue, as he considers himself to have been *functus* as soon as he delivered the goods to the carrier.

When the Respondent was ordained by the Lord Ordinary to exhibit a letter, which the Petitioner had alleged had been wrote by Hethrington the Rider, along with the commission to his master; and as the Petitioner all along averred that he or his clerk had wrote a letter to the Respondent, commanding the commission, some considerable time after the invoice and letter of advice came to hand, on this occasion a copy of a Representation for the Petitioner was sent to the Respondent, when he was desired to make a particular answer as to the above letters.

This answer was stated to the Lord Ordinary in the Respondent's own words to his correspondent here, as copied from his letter produced, and it shall again be submitted to your Lordships; from which you will easily discover, that it was not wrote with any intention of being produced in court.

“ You have here my rider Hethrington's letter (that is, the
 “ holograph list of goods so often mentioned) to me, which
 “ you will find agrees with his order-book, and the former part,
 “ how exact he is mentioning to whose care the goods was
 “ sent. Now in a town as Kelso, were they all was to go to
 “ one person, there was no necessity for mentioning under e-
 “ very person's particular order.——You will see the Ber-
 “ wick goods are ordered to Lea's wharf. Mr. John Crawford
 “ of Kelso was with Johnston when he gave his order, and his
 “ was ordered to Hore's-wharf, the same as Mr. John Smith's;
 “ that it is very clear they all was ordered to Ed. Hore.-----
 “ I assure you he never wrote to me concerning the goods; for
 “ in my invoice to him he was advised of their being sent
 “ to Hore; now if he had any objection to their being sent
 to

“ to him, he had time to write Hore to deliver them else-
 “ where.—I can assure you Hethrington never carried
 “ any other book than that sent, which will show itself by
 “ the manner in which it is carried on from time to time.--
 “ A broad book, any one must know, would be very in-
 “ convenient to carry, and such a thing no servant of mine
 “ ever did carry ; another circumstance in this representa-
 “ tion, he says to Dun’s wharf, formerly Driver’s, you will
 “ see by this letter, it was Lea that kept the wharff for
 “ Berwick : I do assure you again I never had any letter
 “ from Johnston ; you will see by this letter, that Craw-
 “ ford’s order was after Johnston’s, and can any one sup-
 “ pose Hethrington would contradict what is so particularly
 “ expressed in his books, &c.—It is very plainly Smith’s
 “ order ; they got their goods by Leith at that time, and I
 “ am very sure Hethrington never carried any other order-
 “ book than that sent---Hore as is usual, I imagine, wrote
 “ Johnston of his shipping the goods, which occasioned
 “ Johnston to write him again.”

This letter shall be submitted without any commentary ;
 and not to waste any more of your Lordships time in a que-
 stion which appears, with submission, to be equally simple
 and clear, the Respondent shall only beg leave to observe,
 that, if the authentic and corroborative pieces of written evi-
 dence, which are here produced, shall be allowed to be de-
 feated by vague allegations and uncertain parole evidence,
 there will at once be an end of all good faith and secure
 dealings amongst merchants, and that commerical intercourse
 which has hitherto subsisted with absolute security between
 the different trading corners of the world, will infallibly be
 blown up.

For these reasons, it is humbly hoped, that your Lord-
 ships will have no sort of difficulty in refusing the desire of
 this Petition, and adhering to the three consecutive interlocu-
 tors of the Lord Ordinary, reclaimed against, which decern
 against the Petitioner for the sum pursued for, find expences
 due, and ordain an account to be given in.

In respect whereof, &c.

WILLIAM MACKENZIE.

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